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No. (1)

Supreme Court, U.S.
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In The Supreme Court of the United States

INDEPENDENCE NEWS, INCORPORATED,
a North Carolina Corporation;
POLO SOUTH, INCORPORATED,

Petitioners,

v.

CITY OF CHARLOTTE,
a North Carolina Municipal Corporation,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the United States Court of Appeals for the Fourth Circuit erred and opened a split among the various Circuit Court of Appeals in affirming the district court's granting of the Motion for Partial Judgment on the Pleadings on the Petitioner's "as applied" First Amendment challenge to the enforcement of the Adult Zoning Ordinance for the City of Charlotte?

Whether the United States Court of Appeals for the Fourth Circuit erred and opened a splint amond of various Circuit Court of Appeals in affirming the district court's granting of Summary Judgment in favor of the Respondant on the Petitioner"s "facial" First Amendment challenge to the enforcement of the Adult Zoning Ordinance for the City of Charlotte?

PARTIES TO THE PROCEEDING

Petitioners

Independence News, Incorporated, a North Carolina Corporation; Polo South, Incorporated, a North Carolina Corporation

Respondents

City of Charlotte, a North Carolina Municipal Corporation

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Petitioners respectfully requests that this Court issue a writ of certiorari to review the judgment entered in this case by the United States Court of Appeals for the Fourth Circuit.

OPINIONS AND ORDERS BELOW

The published opinion of the United States Court of Appeals for the Fourth Circuit affirming the decision of the United States District Court for the Western District of North Carolina, *Independence News, Incorporated, et al v. City of Charlotte,* No. 08-1654, 568 F. 3d 148 (4th Cir. 2009) (June 3, 2009),No. 08-1654-55 which is contained in the Appendix at App. 1.

The Order granting Judgment in favor of Respondent, *Central Avenue Video, Inc., Et al v. City of Charlotte,* No. 3:02CV14MU (May 12, 2008), which is contained in the Appendix at App. 22

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JURISDICTION

This Court has jurisdiction to review the order of the court of appeals on a writ of certiorari pursuant to 28 U.S.C. § 1254 (1). The judgment of the United States Court of Appeals for the Fourth Circuit was entered on June 3, 2009. This petition for writ of certiorari is timely filed within 90 days from that date. Sup. Ct. R. 13.3. Jurisdiction in the trial court was based on 42 U.S.C. § 1983, 28 U.S.C. ' 1651, and 28 U.S.C. " 2210, 2202, as this is an action arising under the First Amendment to the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Petitioners' claims arise under the First Amendment to the United States Constitution, which provides in relevant part:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech..... (U.S. Const. amend I)

STATEMENT OF THE CASE

In a decision issued on June 3, 2009, a panel of the United States Court of Appeals for the Fourth Circuit held that the Petitioners were unable, as a matter of law, to assert an "as applied: First Amendment challenge the enforcement of the amortization provisions and separation requirements of the Adult Zoning Ordinance adopted by the City of Charlotte, which regulated the location of adult establishments. Additionally the panel rejected the Petitioners "facial" First Amendment challenge to that portion of the ordinance which precluded them from presenting evidence in a variance proceeding before the Zoning Board of Adjustment for the City of Charlotte that the absence of adverse secondary effects at their particular adult sites was a factor that should be considered in determining the appropriateness of a variance. *Independence News, Incorporated, a North Carolina Corporation; Polo South, Incorporation, v. City of Charlotte, a North Carolina Municipal Corporation.*,____ F. 3d _____ (4th Cir. 2009)

In its decision, the Court determined that since the City had a sufficient constitutional evidentiary basis for the adoption of the ordinance, foreclosing "as applied" challenges to the enforcement of that ordinance, years later, indeed for all time. Additionally, Judge Shedd concurred separately because he believed the Petitioners claims to be foreclosed by *Ward v. Rock Against Racism*, 491 U.S. 781 (1989)

The Petitioners respectfully submit that the Fourth Circuit Court of Appeals decision in this case, conflicts with the decision of the Eleventh Circuit Court of Appeals, *Peek-a-Boo Lounge of Bradenton, Inc., v. Manatee County*, 337 F.3d 1251 (11th Cir. 2003) As a consequence, review of the Fourth Circuit's decision is necessary due to the substantial constitutional implications of the Fourth Circuit Court of Appeals determination that "as applied" challenges to the enforcement of zoning provisions are prohibited as a matter of law, and that its holding that the Petitioners are prohibited from presenting evidence at a variance proceeding that their adult uses do not contribute to adverse secondary effects. The Petitioners respectfully submit that the Fourth Circuit Court of Appeals decision is inconsistent with the case law of the United States Supreme Court.

Review is also necessary inasmuch as the decision of the Fourth circuit Court of Appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter. Sup. Ct. R. 10(a), and

I. Procedural History

This case arises from the appeal of the Order of the Honorable Graham C. Mullen, United States District Judge, Western District of North Carolina, Charlotte, Division, granting the respondent's Motion for Partial Judgment on the pleadings, entered on June, 3, 2004; the Order of the Honorable Graham C. Mullen, United States District Judge, Westen District of North Carolina, granting in part,

and denying in part the respondent's Motion for Summary Judgment, signed on September 6, 2006, and entered on September 7, 2006; and the Order of the Honorable Graham C. Mullen, United States District Judge, Western District of North Carolina, Charlotte, Division, after a Bench Trial held on March 3, 2008, finding in favor of the respondent against the petitioner, entered on May 12, 2008; and the Clerk's Entry of Judgment in favor of the respondent on May 12, 2008. The Respondents Independence News & Video, Inc., and Polo South, Inc., appealed the various Orders and Judgment to the Fourth Circuit Court of Appeals. Oral argument was held on **March 27, 2009**. The Fourth Circuit Court of Appeals affirmed the decision of the district court, in an opinion issued on June 3, 2009. ___ F. 3d ____ (4th Cir. 2009).

II. Facts

The Charlotte, North Carolina City Council adopted a Adult Zoning Ordinance on January 18, 1994. The ordinance limits adult business to B-(2) (business), UMUD (Uptown Mixed Use District), and I-I and I-2(industrial) zoning districts. Within these districts, adult bookstores and mini motion picture theaters must be at lease 1,500 feet from any residential zoning district, school, church, child care center, park, or playground (*i.e.* "protected uses"), and at least 1,000 feet from another adult business. Adult live entertainment businesses must be at least 1,000 feet from a protected use and at least 500 feet from another adult business. No more than one adult business may be in the same structure, and preexisting adult businesses not in compliance with

the protected use separation requirements are required to close or relocate to a conforming location within eight years. The City of Charlotte amended the Adult Zoning Ordinance on several occasions after its adoption. These amendments refined definitions, eliminated redundant provisions, closed a conditional district "loophole," and removed a ban on the Zoning Board of Adjustments' ability to grant variances to the ordinance. In addition, the City of Charlotte adopted a Sexually Oriented Business Ordinance, the terms of which are not subject to this petition.

The Petitioners own and operate sexually oriented businesses that are subject to the City's Adult Zoning Ordinance. Petitioner, Independence News, Inc. operates an adult bookstore that does not meet requirements of the Adult Zoning Ordinance and was required by the Ordinance's "amoritization" provision to close or relocate to a conforming location by January 18, 2002. Similarly, Petritioner Polo South, Inc. owns and operates a live adult entertainment establishment that falls under the amoritization provision as of the same date.

After the Court's Orders on Motions for Summary Judgment, entered on June 3, 2004 and September 5, 2006, Central Avenue Video and Riverside Video Plus were the only plaintiffs with outstanding claims to be resolved by the Court at a bench trial hearing held on March,3, 2008. The issues which the Petitioners preserved for review on appeal had been resolved by prior Orders of the Court.

Even though the Petitioners had filed a number of claims, the two claims which the Petitioners believed were its most serious, and

presented the most compelling legal questions were those two questions presented in this Petition for a Writ of Certiorari. In particular, the Petitioners maintain that they should be entitled to maintain an "as applied" challenge to the enforcement of the Adult Zoning Ordinance by showing that their adult sites have not, over a course of now sixteen years, contributed to the types of adverse secondary effects the ordinance was enacted to address and prevent. Of equal, and perhaps more importance is their belief that they should be entitled, at a zoning variance proceeding, to present evidence to the board that their sites have not contributed to adverse and negative secondary effects, and that this should be a factor which the Board should consider. While this was pled and treated as part of the Petitioner's "facial' challenge, the argument has "as applied" implications as well.

On June 3, 2004, the District Court granted the City's Motion for Partial Judgment on the Pleadings and dismissed the "as-applied" challenge to the secondary effects rationale of the Adult Zoning Ordinance that was included in the parties' claim for first amendment violations.

In its Order of September 6, 2006, the District granted in part and denied in part Respondent's Motion for Summary Judgment. As a result of the Court's ruling on the Motions for Partial Judgment on the Pleadings and Summary Judgment, the only claim the current plaintiff/appellants had unresolved was the claim concerning alternate sites. Prior to trial, the parties entered into stipulation as to where the burden of proof/persuasion falls on each issue.

The Petitioners filed stipulations of dismissal as to all claims which had not been resolved by the

Court in its prior orders, preserving those issues for this appeal. The only two issues which the plaintiff/appellants preserved for review by the Fourth Circuit Court of Appeals were the rulings on the "as applied" challenge, and that portion of the plaintiff/appellant's "as applied" and "facial" claim relating to the refusal by the City to allow the plaintiff/appellants to present evidence to the Zoning Board of Adjustment, reflecting that over an eight year period their particular uses did not contribute to the negative adverse secondary effects the Ordinance was intended to prevent. The Fourth Circuit Court of Appeals affirmed the district court.

REASONS FOR GRANTING THE WRIT

I. The decision of the Fourth Circuit Court of Appeals is inconsistent with the case law of the United States Supreme Court, and involves the substantial deprivation of the Petitioner's constitutional

The Fourth Circuit determined as a matter of law that the petitioner is precluded from asserting an as applied First Amendment challenge to the enforcement of the City of Charlotte's Adult Zoning Ordinance. The Petitioner's involvement in this case has primarily centered around the issue of whether they can defend against the enforcement of the Adult Zoning Ordinance by showing that their adult uses have not, over a substantial time period, contributed to the types of adverse and negative secondary effects the ordinance was enacted to prevent, or whether in a variance proceeding they are entitled to

submit the same type of evidence before the Zoning Board of Adjustment.

United States District Judge Mullen, and the panel of the Fourth Circuit Court of Appeals have concluded that the Petitioners can do neither.

The Petitioners respectfully submit that they have standing, and the right to challenge constitutionality of the impermissible regulation of their individual exercise of protected speech, by the provisions of §12.518 of the Charlotte Zoning Ordinance, on an "as applied" basis, and that the pleadings in this case are sufficient to state a claim upon which relief might be granted. It is interesting to note that each of the Respondent's uses was a lawfully zoned use when the adult zoning ordinance was adopted. Each site would ordinarily have been grand-fathered as lawful non-conforming uses except for the fact that the City Council made a political decision in 1994 to include an amortization provision, in contradiction to the recommendation of the Planning Commission that the sites be allowed to continue in operation as grand-fathered uses.

The Petitioners do not contend that it is unconstitutional to apply an adult zoning requirement to a particular business site or unconstitutional to deny that particular business a zoning variance unless the City can prove that particular business causes the type of negative secondary effects that the ordinance is designed to protect against. Instead, the Petitioners contend that if they can establish, by the preponderance of the evidence, that their particular adult business uses have not, over the course of years, contributed in any way to adverse secondary effects, the burden shifts back to the government to show that the

closure of these sites is actually necessary to prevent the undesired negative secondary effects. The Petitioners recognize that they have the initial burden to produce evidence to negate the existence of secondary effects. In particular, they have alleged, and were prepared to present evidence that at each site:

1. Crime had not increased in the area as a result of their adult uses;
2. Sexual crimes had not occurred in the area as a result of their adult uses;
3. Property values had not decreased as a result of their adult uses;
4. Businesses had not closed as a result of their adult uses;
5. The general business and residential areas surrounding their adult uses had not suffered from blighting, thus discouraging nearby business development and residential development.

In their pleadings, the Petitioners asserted many claims, but the two most important claims put forward to the district court were the claims that enforcement of the ordinance amortization provisions against the Petitioner was unconstitutional "as applied" against them due to the absence of adverse secondary effects at their sites, and that the refusal to allow them to present evidence in a variance proceeding that their uses did not contribute to adverse secondary effects rendered the ordinance unconstitutional "as applied" to them, and facially. The Fourth Circuit held that if there was a legally sufficient theoretical evidentiary basis for the adoption of an adult zoning ordinance, then

the validity of the ordinance survives the test of time, even if erroneous, and can not be challenged in the future. In his concurring opinion, Judge Shedd relies upon Ward v. Rock Against Racism, 491 U.S. 781 (1989), a decision of this Court as barring "as applied" challenges. The Petitioners submit that Ward presents facts and circumstances that are completely different than the facts here. In particular, the Central Park regulations did not prohibit the exercise of speech, instead, the regulations merely insured that sound levels would be within set parameters. To insure this, performers were required to use city selected sound personnel and equipment. All performers were required to use the city-approved sound personnel and equipment. The regulations which applied to all performers were completely content-neutral without any reference to the affected speech. All the performers were required to do to perform in Central Park was to make use of the city-approved sound personnel and equipment. In addition, in its subsequent decision, United States v. Edge Broadcasting Company, 509 U.S. 418 (1993), this Court citing Ward, addressed the subject of an "as applied" challenge, observing that in determining whether the regulation of commercial speech violated the First Amendment, the validity of the regulations application to a single entity or individual is not an irrelevant inquiry

The Petitioners submit that City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425 (2002) supports their contentions, that they are entitled to make "as applied challenges to the adoption and enforcement of the provisions of Charlotte's adult zoning ordinance "as applied" to their adult uses, and their "facial" challenge to the limitations placed

upon the evidence presented at a variance proceeding before the Charlotte Zoning Board of Adjustment. In Alamdea, this Court recognized the opportunity a plaintiff has to challenge the City's justification for the adoption of an adult zoning ordinance, and acknowledged that if sufficient evidence is presented to rebut the City's information, the burden shifts back to the City to provide evidence renewing support for a theory justifying its ordinance. While the plurality of the Court recognized that Municipalities were entitled to experiment with solutions to negative adverse secondary effects which may be caused by adult uses, even the members of the plurality would not allow a municipality:

> ....to get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance. If appellants fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnish evidence that disputes the municipality's factual findings, the municipality meets the standard set forth in *Renton*. If plaintiff succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justified its ordinance.

535 U.S. at 438,439.

The Petitioners submit that the same type of analysis which would govern the adoption of an ordinance should be applicable to the enforcement of that ordinance. Put simply, if sixteen years of history tend to show that the negative effects feared by the city at the time of the adoption of an adult zoning ordinance can not be associated with a particular adult site, enforcement of a separation requirement contained in that ordinance is likely based upon something other than a genuine concern about the potential for adverse secondary effects. The Fourth Circuit rejected the Petitioner's reliance upon *Alameda*, by holding that the only relevant inquiry into the governmental intentions is at the time of the adoption of an ordinance. Alameda does not go as far as the Petitioner's desire, and they concede as much. They maintain, however, that a natural extension of *Alameda*, would require an opportunity to determine whether the theoretical concerns which might have existed at the time of the adoption of an ordinance affecting the exercise of speech have come to fruition or whether the opposite is true.

The Eleventh Circuit addressed a similar claim to that presented by this case. In *Peek-a-Boo Lounge of Bradenton, Inc., v. Manatee County, Florida,* 337 F. 3d 1251 (11th Cir. 2003), the court reversed the trial court's granting of the County's motion for summary judgment and remanded the case for trial. In Peek-a-Boo Lounge, the plaintiffs challenged the application of an anti-nudity ordinance on the basis of the failure of the evidentiary basis of potential adverse secondary effects to support the ordinance. In opposition to summary judgment, the plaintiff presented

substantial evidence of satisfactory health and safety inspections; incident reports of criminal activity near the clubs and elsewhere which reflected a lower crime rate near the businesses than in surrounding areas; recent sales and assessment date revealing an increase in property values for property located near the businesses; and expert testimony negating the suggestion that the plaintiffs contributed to adverse secondary effects. In addition, expert evidence was presented showing appreciating real estate values in the surrounding area, favorable lease space and properties for sale, and a general strong and stable economic conditions in the areas close by the adult uses. Applying an analysis as required by *Alameda,* the Eleventh Circuit determined that the plaintiffs had managed in their "as applied" challenge to cast doubt upon the County's basis for enacting the adult ordinance in question, and remanded the matter for trial, affording the County the opportunity to supplement the record with further evidence that its ordinance was necessary to combat secondary effects.

The argument in Peek-a-Boo Lounge, is identical to the argument in this case. The Petitioners respectfully submit that in the fifteen years that have transpired since the adoption of the adult zoning ordinance in Charlotte, the empirical evidence, all of which comes from the official records maintained by the City of Charlotte, negate the suggestion that the Petitioner's adult uses have contributed to adverse secondary effects. This evidence was not presented to the District Court, inasmuch as the Petitioner's "as applied' challenges were precluded by the court's granting of the City's Motion for Partial Judgment on the Pleadings. The

Petitioners respectfully submit that the Fourth Circuit Court of Appeals has interpreted this Court's opinions too narrowly, and erred by affirming the district court's granting of the Respondent's Motion for Partial Judgment on the Pleadings, and urge the Court to issue its Writ of Certiorari on this basis.

In their pleadings, the appellants complained that the provisions of the variance procedures established by the City for adult uses violated the First Amendment rights. At the time § 12.518 of the Zoning Code for the City of Charlotte, was adopted, it was the express intention of the Charlotte City Council for adult uses to be denied an opportunity to petition the Board of Adjustment for the City of Charlotte for a variance. Thereafter, after a change of legal counsel, and as a result of litigation between an adult book-store and the City of Charlotte, § 12.518 of the Zoning Code for the City of Charlotte amended to allow the issuance of a variance by the Board of Adjustment subject to certain conditions and limitations. At variance hearings, in addition to meeting the statutory requirements for a variance, a petitioner must, satisfy the Board of Adjustment that the potential for adverse secondary effects is limited. However, pursuant to the provisions of § 12-518(g), the Board of Adjustment's consideration is limited to issues of whether traffic circulation patterns, structures or other natural or man-made geographic or topographic features are likely to provide an adequate measure of protection for the protected zoning or use from any secondary effects of the adult establishments.

The Petitioners will have an opportunity to file petitions for variances before the Charlotte-

Mecklenburg Zoning Board of Adjustment. As things currently stand the Board of Adjustment will consider only matters relating to traffic circulation patterns, structures or other natural or man-made geographic or topographic features which might be likely to provide an adequate measure of protection for the protected zoning or use from any theoretical or potential secondary effects of the adult establishments. The Board and will not consider evidence which the Petitioners intend to present that their adult uses do not, and have not contributed to actual adverse undesirable secondary effects on protected zoning categories

Inasmuch as a variance proceeding is an individual challenge to zoning restrictions, the Petitioners maintain that to deny them an opportunity to address the presence, or lack, of secondary effects at their locations is a content based restriction which lumps all adult uses together without regard to the individual circumstances of each particular adult use. Either the City of Charlotte is serious about the potential for secondary effects or it is not. To deny a variance applicant the opportunity to present evidence concerning the presence of secondary effects, and to deny a Board of Adjustment the opportunity to make its own determination of whether a particular adult use contribute to secondary effects, reflects poorly upon the rationale for adopting an adult use ordinance in the first instance, and deprives the appellants of their right to the free exercise of speech. Accordingly, the Petitioners believe that granting summary judgment was inappropriate. The Petitioners respectfully submit, that consistent with the requirements of *City of Los Angeles v.*

Alameda Books, Inc., *supra*, as explained in *Peek-a-Boo Lounge of Bradenton, Inc., v. Manatee County, supra*, the Petitioners were sufficient to cast doubt upon the rationale put forth by the Respondent in the adoption and enforcement, and the variance proceedings relating to its adult zoning ordinance, sufficient to shift the burden back to the City to supplement the record with additional justification for the zoning ordinance, and in particular, the limitations imposed on variance proceedings. Accordingly, the appellants maintain that summary judgment in favor of the City was inappropriate, and respectfully urge the Court to issue its Writ of Certiorari.

II. The Panel's Decision Conflicts With a Published Decision of Another Circuit.

The Petitioners respectfully submit that the Fourth Circuit Court of Appeals decision is inconsistent with the published decisions of other circuits, thus creating a split among the circuits. In particular, as discussed above, in Peek-a-Boo Lounge of Bradenton, Inc., v. Manatee County, Florida, 337 F. 3d 1251 (11th Cir. 2003) the Eleventh Circuit Court of Appeals reversed the granting of summary judgment in favor of the County, and remanded for trial on the plaintiff's "as applied challenges. The Sixth Circuit recognized an individual's right to challenge the enforcement of a state statute on as as-applied basis in Amelkin v. McClure, 205 F.3d 293 (6th Cir. 2000). In Amelkin, a group of lawyers, chiropractors and a newspaper publisher challenged the constitutionality of Kentucky's statutes restricting disbursement of motor vehicle accident reports, and

allowing the state custodian to charge a reasonable fee for producing copies of nonexempt reports The Court rejected the facial challenge to the Kentucky statute and remanded for the district court to consider the plaintiff's as applied challenge. In addition to these circuit decisions, "as applied" challenges have been recognized by United States District Courts.. In Olmer v. City of Lincoln, 23 F. Supp. 2d 1091 (D.Neb. 1998), recognizing and defining an as-applied challenge in a First Amendment case involving abortion protest. 23 F. Supp. 2d at 1107.

In Gaudiya Vaishnaya Society v. City of Monterey, 7 F. Supp. 2d 1034 (N.D. Cal. 1998), the district court recognized an as-applied First Amendment challenge to an ordinance, stating that such a challenge asserts that an ordinance is unconstitutional as applied to particular plaintiff's speech activities even though the ordinance may be valid as applied to other parties.

Accordingly, based upon the conflict between the various circuits, district court's entry of summary judgment for the Respondents should be reviewed, and the Petitioners urge the Court to issue its Writ of Certiorari.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. _____

In The Supreme Court of the United States

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POLO SOUTH, INCORPORATED,
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CITY OF CHARLOTTE,
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Respondent.

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APPENDIX

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PUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

INDEPENDENCE NEWS, INCORPORATED, a North Carolina Corporation; POLO SOUTH, INCORPORATED,

Plaintiffs-Appellants,

and

CENTRAL AVENUE VIDEO, INCORPORATED, a North Carolina Corporation,

Plaintiff,

No. 08-1654

O'SHEILDS ENTERTAINMENT, INCORPORATED; RIVERSIDE VIDEO PLUS,

Intervenors / Plaintiffs,

v.

CITY OF CHARLOTTE, a North Carolina Municipal Corporation,

Defendant-Appellee.

INDEPENDENCE NEWS v. CHARLOTTE

INDEPENDENCE NEWS, INCORPORATED, a NORTH CAROLINA CORPORATION; POLO SOUTH, INCORPORATED,

Plaintiffs-Appellants,

and

CENTRAL AVENUE VIDEO, INCORPORATED, a North Carolina Corporation,

Plaintiff,

No. 08-1655

O'SHEILDS ENTERTAINMENT, INCORPORATED; RIVERSIDE VIDEO PLUS,

Intervenors / Plaintiffs,

v.

CITY OF CHARLOTTE, a North Carolina Municipal Corporation,

Defendant-Appellee.

Appeals from the United States District Court for the Western District of North Carolina, at Charlotte.
Graham C. Mullen, Senior District Judge.
(3:02-cv-00014-GCM)

Argued: March 27, 2009

Decided: June 3, 2009

Before WILLIAMS, Chief Judge, and SHEDD and AGEE,
Circuit Judges.

Affirmed by published opinion. Chief Judge Williams wrote the opinion, in which Judge Agee concurred. Judge Shedd wrote a separate concurring opinion.

COUNSEL

Joseph L. Ledford, Charlotte, North Carolina, for Appellants.
Robert Erwin Hagemann, OFFICE OF THE CITY ATTORNEY,
Charlotte, North Carolina, for Appellee.

OPINION

WILLIAMS, Chief Judge:

In 1994, the City of Charlotte ("City") enacted an Adult Zoning Ordinance ("AZO") to protect certain sensitive uses from the "secondary effects" associated with adult establishments.

The ordinance contains an amortization provision that required covered adult establishments to close or relocate to a conforming location by January 18, 2002. Independence News, Inc. ("Independence News") and Polo South, Inc. ("Polo South") (collectively, "Appellants"), which own and operate sexually oriented adult establishments subject to the AZO, filed this lawsuit in the District Court for the Western District of North Carolina seeking to avoid enforcement of the amortization provision against their establishments. Appellants claimed, *inter alia*, that enforcement of the AZO would strip them of their First Amendment

protections because their adult establishments had not produced any unwanted secondary effects in the years since the AZO's enactment.

The district court dismissed the Appellants' as-applied challenge to the secondary effects rationale of the AZO, and it also granted summary judgment in favor of the City on Appellants' facial challenge to the AZO's variance provision, which does not require the Charlotte Zoning Board of Adjustment ("ZBA") to consider the absence of "secondary effects" when deciding whether to grant a variance.

On appeal, Appellants challenge both of these rulings. For the following reasons, we affirm.

I.

A.

On January 18, 1994, the City adopted the AZO, a text amendment to the Charlotte Zoning Ordinance. Charlotte, N.C., Ordinance 3782 (Jan. 18, 1994), current version codified at Charlotte, N.C., Code, app. A §§ 2.201, 9.8503, 9.903, 9.1103, and 12.518 (2008). The AZO defined the term "adult establishment" and limited the location of adult establishments to several zoning districts: B-2 (Business), UMUD (Uptown Mixed Use District), and I-1 and I-2 (Industrial). *Id.* It also included a section, Section 12.518, which required, and continues to require, that adult establishments be located at certain distances from any protected use—that is, any residential district, school, church, child care center, park or playground. *Id.* Specifically,

section 12.518(a) provides that adult bookstores and adult mini-motion picture theaters must be at least 1,500 feet from any protected use, and section 12.518(b) requires that adult live entertainment establishments be at least 1,000 feet from any protected use. *Id.* Also, section 12.518(c) provides that adult bookstores and adult mini-motion picture theaters must be at least 1,000 feet from any other adult establishment, and section 12.518(d) provides that adult live entertainment establishments be at least 500 feet from any other adult establishment. *Id.* No more than one adult establishment may be located in the same building. *Id.*

Section 12.518 was added in an effort to "establish reasonable regulations to prevent a concentration of adult establishments within the City of Charlotte and to separate adult establishments from . . . sensitive uses" because "[s]tudies . . .show[ ] that lowered property values and increased crime rates tend to accompany and are brought about by the concentration of adult establishments." *Id.* In the City's view, such "[r]egulation . . . [wa]s necessary to insure that [the effects from adult establishments] do not contribute to the blighting of surrounding neighborhoods and to protect the integrity of the City's schools, churches, child care centers, parks and playgrounds which are typically areas in which juveniles congregate." *Id.*

Through the amortization provision, the AZO gave preexisting adult establishments not in compliance with the protected use separation requirements of sections 12.518(a) and (b) until January 18, 2002—

eight years from the date of the AZO's adoption—to either close or relocate to a conforming location. *Id.*

Initially, section 12.518 did not allow the ZBA to authorize a variance from the protected use separation requirements, but on March 18, 1996, the City granted the ZBA that authority by adding section 12.518(g), which provides:

> [B]efore granting a variance from the separation requirements . . . , the Board of Adjustment shall find that thoroughfares, traffic circulation patterns, structures or other natural or man-made geographic or topographic features are likely to provide an adequate measure of protection for the protected zoningor use from any secondary effects of the adult establishment.

Charlotte, N.C., Ordinance 489 (Mar. 18, 1996), codified at Charlotte, N.C., Code, app. A § 12.518(g) (2008).

B.

Independence News has operated an adult bookstore at its present location in the City since 1993.[1] In October of 2001, the Charlotte-Mecklenburg Zoning Administrator sent Independence News a notice,

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[1] After moving to its current location in 1993, Independence News began operations with an adult bookstore and an adult mini-motion picture theater arcade. In 1999, the City of Charlotte adopted a Sexually Oriented Business Ordinance, Charlotte, N.C., Ordinance 1341 (Aug. 23, 1999), and consequently, Independence News ceased operating mini-motion picture theaters.

advising that Independence News's adult uses were in violation of the protected use separation requirements of section 12.518(a) and reminding Independence News that the AZO's amortization provision required Independence News to close or relocate to a conforming location by January 18, 2002.

Similarly, Polo South has operated a live adult entertainment establishment known as the "Carousel Club" at its present location in the City since 1993. In October of 2001, the Charlotte-Mecklenburg Zoning Administrator likewise sent Polo South a notice, advising that Polo South's adult uses were in violation of the protected use separation requirements of section 12.518(b) and reminding Polo South that the AZO's amortization provision required Polo South to close or relocate to a conforming location by January 18, 2002.

One week before the amortization deadline, Independence News and another affected business filed this action in federal district court, challenging certain provisions of the City's Zoning Ordinance. A few days later, in another case challenging the AZO, the district court entered a preliminary injunction enjoining the City from enforcing the amortization provision against any affected business pending final resolution. *See Queen City Video & News, Inc. v. City of Charlotte*, o. 3:00CV618 (W.D.N.C. Jan. 16, 2002) (order granting motion for preliminary injunction). The district court held this case in abeyance pending the disposition of the *Queen City* case.

Ultimately, the district court granted summary judgment in favor of the City in *Queen City* on all

claims except one, and the parties in *Queen City* entered into a Stipulation of Voluntary Dismissal with Prejudice. The district court then activated this case, and the City consented to the intervention of Polo South and two other affected businesses, agreeing that it would not enforce the amortization provision until the matters before the court were resolved.

The amended complaints filed by Independence News and Polo South demanded a permanent injunction prohibiting the City from enforcing the amortization provision against the Appellants, a declaratory judgment that section 12.518 of the City's Zoning Ordinance violated their First Amendment rights both facially and as-applied, and an order directing the ZBA to consider whether the Appellants' establishments actually generate adverse secondary effects against protected uses when determining whether or not to grant a variance.

Relevant to this appeal, Independence News and Polo South claimed that section 12.518 of the AZO is "unconstitutional as applied against [Appellant]s based upon the evidence . . . concerning the history of [Appellant]s' businesses over a nine year period which clearly shows that no adverse secondary effects to protected zoning and uses can be attributed to [Appellant]s' constitutionally protected adult business uses." (J.A. at 30, 64.) In particular, Independence News and Polo South alleged that, during the nine year period following the AZO's enactment, property values had held steady or generally increased in the area surrounding their

establishments; no sex related crimes had occurred in the area, and crime in general had not increased in the area as of result of their adult establishments; a number of businesses had located within the area surrounding the Appellants' adult establishments; and residential construction was currently taking place within the area surrounding Appellants' establishments.

On June 3, 2004, the district court granted the City's motion for partial judgment on the pleadings and dismissed the as-applied challenge to the secondary effects rationale of the AZO, concluding that "it is . . . settled that [Appellants] can not maintain an 'as-applied challenge' to [the] secondary effects rationale of the AZO's time, place, and manner restrictions." (J.A. at 85.) Then, on September 6, 2006, the district court granted in part and denied in part the City's motion for partial summary judgment. As part of that order, the district court granted summary judgment in favor of the City on the Appellants' allegation that the AZO is unconstitutional because its variance provision does not allow the ZBA to consider factual evidence concerning the secondary effects of a particular adult business.

On May 9, 2008, Appellants filed an amended stipulation of dismissal as to all outstanding claims and preserved those resolved issues for this appeal. After a final judgment in favor of the City on the remaining claims asserted by other affected businesses, Appellants timely noticed an appeal, and

we possess jurisdiction under 28 U.S.C.A. § 1291 (West 2006).[2]

II.

A.

Before us, Appellants contest only two of the district court's rulings. First, they contend that, in granting partial judgment on the pleadings in favor of the City, the district court incorrectly concluded that Appellants did not have the right to maintain an as-applied challenge to the application and enforcement of the AZO's protected use separation requirements and amortization provision to Appellants' adult establishments. Second, Appellants contend that the district court erred in granting summary judgment to the City on Appellants' facial challenge to section 12.518(g). On this claim, the Appellants take issue with the fact that section 12.518(g) does not require the ZBA to consider evidence that Appellants' particular adult establishments do not generate adverse secondary

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[2] We requested additional briefing on the issue of whether we have jurisdiction to hear adjudicated claims following a voluntary dismissal of the remaining unadjudicated claims without prejudice. *Compare, e.g.*, *James v. Price Stern Sloan, Inc.*, 283 F.3d 1064, 1065-70 (9th Cir. 2002) (finding jurisdiction) *with Chappelle v. Beacon Commc'ns Corp.*, 84 F.3d 652, 653-55 (2d Cir. 1996) (finding no jurisdiction). We, however, need not reach this question today because the parties have satisfied us that the dismissal of the Appellants' remaining claims after the grant of partial summary judgment in favor of the City was with prejudice.

effects in deciding whether to grant Appellants variances should they ultimately seek them.

We review *de novo* the district court's decision to grant partial judgment on the pleadings in favor of the City, applying the same standard for Federal Rule of Civil Procedure 12(c) motions as for motions made pursuant to Rule 12(b)(6). *Edwards v. City of Goldsboro*, 178 F.3d 231, 243 (4th Cir. 1999). And, we also review *de novo* the district court's grant of summary judgment in favor of the City, applying the same Rule 56 standard as the district court was required to apply. *BB&T Corp. v. United States*, 523 F.3d 461, 471 (4th Cir. 2008).

B.

We first turn to the district court's grant of partial judgment on the pleadings in favor of the City on Appellants' as-applied challenge to the AZO's protected use separation requirements and amortization provision.

In *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), a case involving a facial challenge to a content-neutral time, place, and manner restriction, the United States Supreme Court stated that "the validity of [the content-neutral time, place and manner restriction] depends on the relation it bears to the overall problem the government seeks to correct, *not on the extent to which it furthers the government's interests in an individual case*. . . . [The restriction] is valid so long as the city could reasonably have determined that its interests overall would be served less effectively without the

[restriction] than with it." 491 U.S. at 801 (emphasis added). Based on this statement, the district court concluded that Appellants could not maintain an as-applied challenge to the secondary effects rationale of the AZO and granted judgment on the pleadings in favor of the City.

We agree with the district court that judgment in favor of the City was proper on this claim. Like the ordinance in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), which prohibited any adult movie theater from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school, the AZO is properly analyzed as a time, place, and manner regulation because it does not ban adult establishments altogether but merely requires that such establishments be located certain distances from protected uses. *See id.* at 46 (analyzing Renton ordinance as a time, place, and manner restriction). And, just as the *Renton* ordinance was aimed at the secondary effects of the adult theaters—that is, increasing crime rates, decreasing property values, and the decreasing quality of Renton's neighborhoods—rather than at the content of the films shown at the theaters, the AZO is aimed at the secondary effects of adult establishments, not the content of regulated speech, and is thus properly deemed "content-neutral." *See id.* at 47-49 (analyzing the Renton ordinance as content-neutral).

Under *Renton*, content-neutral time, place, and manner restrictions such as the AZO are "acceptable as long as they are designed to serve a substantial governmental interest and do not unreasonably limit

alternative avenues of communication." *Id.* at 47. Such regulations must also be "narrowly tailored" to achieve the substantial governmental interest. *Ward*, 491 U.S. at 798 ("[W]e reaffirm today that a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so."); *see also Renton*, 475 U.S. at 52 (emphasizing that the Renton ordinance was "'narrowly tailored' to affect only that category of theaters shown to produce the unwanted secondary effects").

Moreover, when enacting an ordinance aimed at secondary effects, a City must rely on "evidence of incidental adverse social effect that provides the important governmental interest justifying reasonable time, place and manner restrictions on speech or expressive conduct." *Mitchell v. Comm'n on Adult Entm't Establishments*, 10 F.3d 123, 133 (3d Cir. 1993). In enacting adult zoning ordinances, the City, however, is entitled to "rely heavily on the experience of, and studies produced by, other cities and states, as well as on court opinions from other jurisdictions," *id.* at 133, and need not, before enacting such ordinances, "conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses."[3] *City of Renton*, 475 U.S. at 51-52.

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[3] These standards for reviewing challenges to content-neutral zoning ordinances targeting the secondary effects of adult establishments apply regardless of whether that

In this appeal, Appellants do not argue that the City's ordinance was not narrowly tailored to serve a substantial Government interest, that the City lacked an adequate evidentiary basis for adopting the proposed legislation, or that the ordinance did not provide for reasonable alternative avenues of communication; in fact, Appellants *concede* that the AZO as adopted was facially valid. Rather, Appellants seek to escape the AZO's amortization provision by arguing that, although "a city must have latitude to experiment, at least at the outset," *City of Los Angeles v. Alameda Books*, 535 U.S. 425, 451 (2002) (Kennedy, J., concurring in the judgment), once the data from the "experiment" has been collected, the Appellants must have an opportunity to show that the data does not support the City's original hypothesis—that adult establishments generate adverse secondary effects. Thus, according to Appellants, the AZO—a time, place, and manner restriction like the one at issue in *Renton*—is unconstitutional as-applied to their establishments because empirical data gathered in the years *after* the passage of the ordinance in 1994 demonstrates that their particular adult

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challenge is styled as facial or as-applied. *See David Vincent, Inc. v. Broward County*, 200 F.3d 1325, 1333 (11th Cir. 2000) (noting that, in as-applied challenge, "zoning ordinances that target the social ills associated with adult entertainment are constitutional if they are narrowly tailored to further a substantial government interest an allow for reasonable alternative avenues of communication" (internal quotation marks omitted)); *One World One Family Now v. City & County of Honolulu*, 76 F.3d 1009, 1012 (9th Cir. 1996) (applying time, place, and manner standard to an as-applied challenge to a content-neutral ordinance).

establishments have not generated adverse secondary effects and therefore does not support the original theoretical justification for passing the ordinance.

Appellants are quite right that the Supreme Court has indicated that cities "'must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.'" *City of Renton*, 475 U.S. at 52 (quoting *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976) (plurality opinion)); *see also Alameda Books*, 535 U.S. at 451 (Kennedy, J., concurring in the judgment) ("[W]e have consistently held that a city must have latitude to experiment, at least at the outset, and that very little evidence is required."). Although these statements conceivably could be read, as Appellants read them, to imply that a city's secondary effects rationale for enacting a zoning ordinance like the AZO or the *Renton* ordinance may be subject to a challenge based on post-enactment data, we are not aware of—and Appellants do not point us to—any Supreme Court or federal appellate court opinion allowing such a challenge.[4] Moreover, in the absence

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[4] Appellants contend that *Peek-a-Boo Lounge of Bradenton, Inc. v. Manatee County*, 337 F.3d 1251 (11th Cir. 2003), supports their position. In that case, the plaintiffs challenged two local ordinances; the first ordinance imposed requirements on the physical layout of adult dancing establishments, and the second was a general anti-public nudity statute, not a zoning ordinance. The Eleventh Circuit reversed the district court's grant of summary judgment in favor of the County on the plaintiffs' challenges to both ordinances.

of any clearly defined standards for judging such a postenactment First Amendment challenge—and Appellants provide none here—we are disinclined to grant Appellants relief on this basis.

As discussed above, the applicable standard as it relates to the secondary effects rationale requires only that a city show that, "in *enacting* its adult [establishment] zoning ordinance," the city relied on evidence that is "reasonably believed to be relevant to the problem [of secondary effects] that the city addresses." *City of Renton*, 475 U.S. at 51-52 (emphasis added). Thus, when cities exercise their power to zone the location of adult establishments, they need not show that each individual adult establishment actually generates the undesired secondary effects. *See Ward*, 491 U.S. at 801 ("[T]he validity of [an ordinance] depends on the relation it bears to the overall problem the government seeks to correct, *not on the extent to which it furthers the government's interests in an individual case*." (emphasis added)). And, it follows that the City of Charlotte does not have to show that a particular adult establishment generates adverse secondary

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In *Peek-a-Boo Lounge*, the plaintiffs were challenging the county's evidentiary basis for *enacting* the ordinances and submitted *pre-enactment* data to support their as-applied challenge to the anti-public nudity statute. *Id.* at 1266-67, 1270-73. In the present case, however, Appellants do not challenge whether the City had a sufficient evidentiary basis for enacting the AZO, but challenge the City's failure to consider evidence that was gathered *after the ordinance was passed* and that appellants contend show that their establishments have not in fact generated secondary effects. Thus, *Peek-a-Boo Lounge* provides Appellants no support.

effects each time it seeks to enforce the AZO's protected use separation requirements and amortization provision against that adult establishment. *Cf. BZAPS, Inc. v. City of Mankato*, 268 F.3d 603, 607 (8th Cir. 2001) ("[O]nce a city has validly forbidden adult uses within a particular area, it may enforce that ordinance against all adult uses in that area without showing that a particular use will produce secondary effects."); *David Vincent,Inc. v. Broward County*, 200 F.3d 1325, 1332 n.11 (11th Cir. 2000) ("Courts have frequently upheld the application of new zoning regulations to existing adult businesses with an amortization period."); *Ambassador Books & Video v. City of Little Rock*, 20 F.3d 858, 865 (8th Cir. 1994) (rejecting argument that application of ordinance to existing businesses violated the businesses' First Amendment rights).

What matters here is whether the City had a sufficient evidentiary basis for adopting the ordinance in 1994, *see City of Renton*, 475 U.S. at 51-52 (looking to evidence of secondary effects available to Renton at the time of enactment), and Appellants concede that it did. Accordingly, the district court's grant of partial judgment on the pleadings must be affirmed.

C.

We next turn to the district court's grant of summary judgment in favor of the City on Appellants' claim that the AZO is unconstitutional because its variance provision does not require the ZBA to consider factual evidence concerning the

secondary effects of a particular adult business.[5] In their complaints, Independence News and Polo South maintain:

> The failure on the part of the City Council . . . to allow the . . . Zoning Board of Adjustment to consider factual evidence negating the presence or existence of adverse secondary effects a

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[5] At oral argument, there was some suggestion that we should abstain under *Younger v. Harris*, 401 U.S. 37 (1971), from addressing this issue because the Appellants would have the opportunity to challenge the constitutionality of the variance provision on appeal in state court should any request for a variance be denied by the Zoning Board of Adjustment. As noted by Appellants' counsel, however, North Carolina law precludes the Zoning Board of Adjustment, as well as reviewing courts, from considering the constitutionality of the applicable zoning ordinance when determining whether to grant a variance. *See 321 News & Video, Inc. v. Zoning Bd. of Adjustment*, 619 S.E.2d 885, 887-88 (N.C. Ct. App. 2005)(refusing to consider petitioner's arguments that zoning ordinance was unconstitutional as applied because the Board failed to consider the evidence of the lack of secondary effects violated the First Amendment). Under North Carolina law, the appropriate avenue to challenge the constitutionality of a zoning ordinance is to file a *separate* civil action in state court. *Dobo v. Zoning Bd. of Adjustment*, 562 S.E.2d 108, 112 (N.C. Ct. App. 2002), *rev'd in part on other grounds*, 576 S.E.2d 324 (N.C. 2003). Because thereis no ongoing state judicial proceeding in which Appellants can raise their constitutional challenges, *Younger* abstention is inappropriate. *See Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc.*, 477 U.S. 619, 629 (1986) (noting that, for *Younger* abstention to be appropriate, an aggrieved party must be able to raise constitutional claims in the state-court's judicial review of the administrative proceeding).

> particular adult [business] has on protected zoning or uses reflects that the City is not interested in the factual dataavailable on the issue of the impact of secondaryeffects on protected uses, and is instead only concerned with the political considerations, moral objections and impermissible objections to constitutionally protected speech and to the content of speech, as opposed to a genuine concern for the prevention and elimination of adverse secondary effects, all in violation of the plaintiff's right to the exercise of free speech and the dissemination of constitutionally protected material and the right of free expression, as guaranteed by the First Amendment of the United States Constitution and the Fourteenth Amendment of the United States Constitution.

(J.A. at 30, 65.)

Thus, Appellants request an order directing the ZBA to consider evidence on whether the Appellants' uses actually generate adverse secondary effects when deciding whether to grant a variance.

Like the as-applied challenge to the AZO's secondary effects rationale, this claim seeks an avenue for the Appellantsto avoid the consequences of the AZO's amortization provision.And, like that challenge, we think this claim too must fail.

Considerations about the future play a large, if not central, part in any zoning decision, and, as noted above, cities need not wait for adult establishments

to generate adverse secondary effects in their city before taking action to prevent them from doing so in the future. *City of Renton*, 475 U.S. at 51-52. Where, as here, a zoning ordinance legitimately targets secondary effects, it would make little sense to then require the ZBA to consider evidence that a particular adult establishment is not *currently* generating adverse secondary effects when deciding whether to grant that establishment a variance. In such a case, there is no assurance that the adult establishment will not begin to generate secondary effects in the future. And, if a variance were granted because an establishment is not now generating secondary effects, rather than because physical conditions provide an adequate buffer against any secondary effects that might be generated in the future, there would be no mechanism for addressing those effects if and when they began to occur.

In sum, we simply do not see how the Constitution requires a zoning board to consider whether an adult establishment actually generates secondary effects when deciding whether to grant that establishment a variance. *Cf. David Vincent, Inc.*, 200 F.3d 1325 at 1332 n.11 (noting that the Constitution does not require either a grandfathering clause for existing nonconforming businesses or a waiver provision allowing adult businesses with community approval to locate outside of the areas zoned for their use). This conclusion comports with our conclusion above that the City may enforce the AZO against an adult establishment without regard to whether that particular establishment generates the undesired secondary effects.

Thus, we conclude that the district court properly granted summary judgment in favor of the City on this claim.

III.

For the foregoing reasons, the judgments of the district court are hereby

AFFIRMED.

SHEDD, Circuit Judge, concurring:

I concur in the result reached by the majority because I believe appellants' claims are clearly foreclosed by *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

United States District Court
For The Western District of North Carolina
Charlotte Division

Central Avenue
Video, Inc., Et al,

Plaintiffs,

vs. **JUDGMENT IN A CIVIL CASE**
3:02cv14

City of Charlotte

Defendants

DECISION BY COURT. This action having come before the Court by Bench Trial and a decision having been rendered:

IT IS ORDERED AND ADJUDGED that Judgment is hereby entered in accordance with the Court's 5/12/2008 order.

Signed: May 12, 2008.

FRANK G. JOHNS, CLERK
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
3:02CV00014-MU

CENTRAL AVENUE, INC., *et al.*,

Plaintiffs,

vs. **ORDER**

THE CITY OF CHARLOTTE, NORTH CAROLINA, a North Carolina municipal corporation,

Defendant.

THIS MATTER is before the Court after a Bench Trial held on March 3, 2008. For the reasons set forth below, this Court finds in favor of the Defendant, the City of Charlotte, on all issues.

I. FACTUAL BACKGROUND

This case deals with two separate ordinances, the Adult Zoning Ordinance ("AZO") and the Sexually Oriented Business Ordinance ("SOB").

Adult Zoning Ordinance

The City of Charlotte's City Council adopted the AZO on January 18, 1994. The AZO limits adult businesses to B-2 (business), UMUD (Uptown Mixed Use District), and I-1 and I-2 (industrial) zoning districts. Within these districts, adult bookstores and mini motion picture theaters must be at least 1,500 feet from any residential zoning district, school, church, child care center, park or playground (i.e. "protected uses"), and at least 1,000 feet from another adult business. Adult live entertainment businesses must be at least 1,000 feet from a protected use and at least 500 feet from another adult business. No more than one adult business may be in the same structure, and preexisting adult businesses not in compliance with the protected use separation requirements are required to close or relocate to a conforming location within eight years. The AZO's preamble states:

Studies have shown that lowered property values and increased crime rates tend to accompany and are brought about by the concentration of adult establishments as defined herein. Regulation of these uses is necessary to insure that these effects do not contribute to the blighting of surrounding neighborhoods and to protect the integrity of the City's schools, churches, child care centers, parks and playgrounds which are typically areas in which juveniles congregate. It is the intent of this provision to establish reasonable regulations to prevent a concentration of adult establishments within the City of Charlotte and to separate adult establishments from . . . sensitive uses. . . .

The City of Charlotte ("the City") amended the AZO on several occasions after its adoption. These amendments refined definitions, eliminated redundant provisions, closed a conditional district "loophole," and removed a ban on the Zoning Board of Adjustments' ("ZBA") ability to grant variances to the ordinance.[1]

Sexually Oriented Business Ordinance

The City of Charlotte's City Council adopted the second ordinance at issue in this case on August 23, 1999. The City states that it enacted the SOB after a citizen complained that adult establishments were employing underage erotic dancers. The SOB: (1) requires that all sexually oriented businesses obtain a license; (2) makes employment of a minor unlawful; (3) regulates adult live entertainment businesses by prohibiting "VIP rooms;" (4) establishes "open booth" provisions for adult mini motion picture theaters; and (5) provides operational requirements for "clothing modeling studios." The SOB's purpose is "to regulate sexually oriented businesses to promote provisions for adult mini motion picture theaters; and (5) provides operational

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[1] Charlotte City Ordinance No. 489 amended the AZO by removing language that barred the ZBA from granting variances to the AZO and by providing guidelines for granting such variances stating: ". . . [B]efore granting a variance from the separation requirements . . . the Board of Adjustment shall find that thoroughfares, traffic circulation patterns, structures or other natural or man-made geographic or topographic features are likely to provide an adequate measure of protection for the protected zoning or use from any secondary effects of the adult establishment."

requirements for "clothing modeling studios." The SOB's purpose is "to regulate sexually oriented businesses to promote the health, safety, and general welfare of the citizens of Charlotte, and to establish reasonable and uniform regulations to prevent the deleterious effects of sexually oriented businesses . . ."

The Plaintiffs

Plaintiffs own and operate sexually oriented businesses that are subject to the City's AZO and SOB. Plaintiffs Central Avenue and Video, Inc. ("Central Avenue") and Independence News, Inc. ("Independence News") operate adult bookstores that do not meet requirements of the AZO and were required by the AZO's "amorization" provision to close or relocate to a conforming location by January 18, 2002. Similarly, Plaintiffs O'Shields Entertainment, Inc. ("O'Shields") and Polo South, Inc. ("Polo South") operate live adult entertainment establishments that fall under the amoritization provision as of the same date. Finally, Plaintiff Riverside Video Plus, Inc. ("Riverside") operates a non-conforming adult bookstore that was adopted into Charlotte's planning jurisdiction on October 22, 2001 and is subject to the amoritization provision on October 22, 2009.

After this Court's Orders on Motions for Summary Judgment, entered on June 3, 2004 and September 6, 2006, Central Avenue Video and Riverside Video Plus are the only plaintiffs remaining in this case.

II. PROCEDURAL HISTORY

Approximately one year before the AZO amoritization deadline, the owners of three affected businesses filed a federal lawsuit challenging the AZO and SOB Ordinance. See *Queen City Video & News, Inc. v. City of Charlotte*, 3:00CV618 (W.D.N.C.). In addition, Central Avenue and Video and Independence News initiated this action one week before the amoritization deadline. Shortly thereafter, this Court entered a preliminary injunction in the *Queen City* case enjoining the City from enforcing the amoritization provision against any affected business pending final resolution. The Court then held this action in abeyance pending the disposition of the *Queen City* case.

On August 2, 2002, this Court granted summary judgment for the City in the *Queen City* case on all claims except whether the AZO "provided no or an insufficient number of places to which the First Amendment-protected adult businesses now in operation can legally relocate." Thereafter, the parties in *Queen City* entered into a Stipulation of Voluntary Dismissal with Prejudice, and this Court activated the pending action. The City then consented to the intervention of Plaintiffs Riverside Video, O'Shields Entertainment, and Polo South in this case and agreed that it would not enforce the amoritization provision against Plaintiffs until disposition of this action.

Since this action was first filed by Central Avenue and Video and Independence News, the parties filed two amended complaints. The first amended complaint filed by Central Avenue, Independence News, O'Shields and Polo South

asserted only one claim for relief that demands injunctive relief for violation of first amendment rights. Plaintiffs Central Avenue and Riverside filed a second amended complaint, however, in which the parties assert claims including: 1) free speech violations; 2) due process violations; and 3) equal protection violations.

On June 3, 2004, this Court granted the City's Motion for Partial Judgment on the Pleadings and dismissed the "as-applied" challenge to the secondary effects rationale of the AZO that was included in the parties' claim for first amendment violations. In addition, the Court granted Plaintiffs' motion to dismiss their claim that the SOB imposed an arbitrary or impermissible licensing fee.

Although Plaintiffs stated numerous claims against the AZO and SOB, many of those, including all that go to the SOB, have been previously resolved through the Court's June 3, 2004 Order on Defendant's "Motion for Partial Judgment on the Pleadings" (Document #40) and September 6, 2006 Order on Defendant's "Motion for Summary Judgment" (Document #69).

In its Order on September 6. 2006, this Court granted in part and denied in part Defendant Charlotte's Motion for Summary Judgment. After that order, the Parties filed a joint statement of issues remaining for trial and stipulation as to where the burden of proof/persuasion falls on each issue (Document #70). According to that statement, the remaining issues are as follows:

1. Does Defendant City of Charlotte's Adult Zoning Ordinance ("AZO") unreasonably

limit Plaintiffs' alternative avenues of communication?

2. Does Defendant City of Charlotte's Variance mechanism operate as a "prior restraint" on Plaintiffs' First Amendment protected activities, and if so, is it an unconstitutional prior restraint because it either: (a) vests the Zoning Board of Adjustment with unbridled discretion; or (b) fails to ensure a prompt administrative decision?

3. a. Was the Zoning Board of Adjustment's decision to deny Central Avenue Video's and Riverside Video's variance requests arbitrary and capricious and, therefore, in violation of Central Avenue Video and Riverside Video's substantive due process rights?

b. By denying Central Avenue Video's and Riverside Video's variance requests while granting variances to other adult businesses, did the Zoning Board of Adjustment violate Central Avenue Video's and Riverside Video's equal protection rights?

4. Did Defendant fail to provide Central Avenue Video and Riverside Video with meaningful notice such that they could be meaningfully heard on their zoning variance requests in violation of their procedural due process rights?

The Plaintiffs have now abandoned all of the remaining claims other than (2) and (3)(b). These remaining two claims, which are stated only by Plaintiffs Central Video and Riverside Video, are now before the Court.

III. DISCUSSION

After holding the bench trial and reviewing the parties' arguments and relevant case law, the Court finds in favor of the City of Charlotte on all remaining counts.

A. Defendant City of Charlotte's Variance mechanism does not operate as a "prior restraint" on Plaintiffs' First Amendment protected activities.

A "prior restraint" exists when speech is conditioned upon the prior approval of public officials. *See, e.g., Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 553 (1975). Although prior restraints "are not unconstitutional per se," they come to court bearing a heavy presumption against their validity. *Id.* at 558. Prior restraints are presumptively invalid because they typically involve "two evils that will not be tolerated": (1) the risk of censorship associated with the vesting of unbridled discretion in government officials; and (2) "the risk of indefinitely suppressing permissible speech" when a licensing law fails to provide for the prompt issuance of a license. *FW/PBS v. City of Dallas*, 493 U.S. 215, 225-27 (1990).

Here, Plaintiffs assert that the AZO variance mechanism is a prior restraint doctrine, but the Court finds that the variance mechanism does not serve as a prior restraint because the Plaintiffs' speech is permitted at "by right" locations without a variance. Central Video and Riverside Video could open and operate their adult businesses "by right" at any location within Charlotte's zoning jurisdiction

that meets the zoning regulations without any permission or decision from the ZBA. This regulatory regime does not constitute a system of prior restraint. *Mom N Pops, Inc. v. City of Charlotte*, 979 F.Supp. 372 (1997), *aff'd per curiam*, 162 F.3d 1155 (4 Cir. 1998). By offering the "by-right" locations, the City allows the Plaintiffs to bypass the AZO all-together. Since the Plaintiffs would not have to apply for a variance were they to relocate to one of these "by-right" locations, the variance mechanism cannot be seen as a prior restraint. The cases cited by the Plaintiffs at the hearing and in their supplemental brief are not applicable to the present case because none of the defendants in those cases had a by-right system similar to that of the City in this case.

Normally, the Court would proceed to analyze whether or not the "by right" locations provide reasonable alternative avenues of communication for the Plaintiffs. However, the Plaintiffs have abandoned their claims relating to the reasonable alternative avenues of communication, rendering such an analysis moot.

Since the City's variance mechanism does not operate as a prior restraint, there is no need for this Court to embark on an evaluation of whether the Zoning Board of Adjustment has unbridled discretion or whether the mechanism fails to ensure a prompt administrative decision.

B. The Zoning Board of Adjustment did not violate Central Avenue Video's and Riverside Video's equal protection rights when it denied Plaintiffs' variance requests while granting variances to other adult businesses.

The unequal application of a facially neutral statute may violate the Equal Protection Clause. *See, e.g., E&T Realty v. Strickland,* 830 F.2d 1107, 1112 n.5 (11th Cir. 1987)(discussing discriminatory administration of a facially valid law); see Compl. ¶¶ 44, 48(h). To prove their equal protection claims, the Plaintiffs must show that

> 1) a governmental agent or body intentionally accorded the plaintiff different treatment than it accorded other, similarly situated persons under the same law;
> (2) either the plaintiff is a member of [a] suspect class or the government's treatment of the plaintiff was entirely arbitrary, irrational, intentional, and unrelated to any governmental interest; and (3) the plaintiff suffered an injury that was caused by the discriminatory treatment.

Hyatt v. Town of Lake Lure, 225 F. Supp. 2d 647, 660 (W.D.N.C. 2002)(citations and footnotes omitted); see *GJR Inv., Inc. v. County of Escambia*, 132 F.3d 1359, 1367 (11th Cir.1998)(similar).

In this case, Central Video and Riverside Video claim that ZBA's granting of variances to other adult businesses deprived them of equal protection under the law, but this Court finds the ZBA's decisions to be within their legal perogative. Under North Carolina law, the Board must use the same standards for each case, but the ultimate decision of the Board can vary with the specific facts of each case. *See Through the Looking Glass, Inc. v.*

Zoning Board of Adjustment for the City of Charlotte, 136 N.C.App. 212, 217, 523 S.E.2d 444, 448 (1999).

Here, it appears to the Court that the ZBA did just that: examined each motion for a variance using the same standards, then looked at the individual facts to determine whether or not a variance was appropriate. The ZBA's variance decisions did not distinguish based on the content of speech (i.e., each of the businesses Plaintiffs reference are engaged in the same type of adult speech as were Plaintiffs), but instead were based on factual differences regarding the natural or man-made geographical and/or topographical features between the parcel on which each adult business is or was located and the protected properties and land uses. As the City explains since the very purpose behind the regulations is to protect against the effects of the potential secondary 'spillover' effects of adult businesses, it only makes sense that the Council would craft a standard that allows relief from the separation requirements in instances where there is no realistic likelihood that the protected uses will feel any spillover effects from the business (e.g., consider a situation where a school lies 800 ft. across a river "as the crow flies," but one-mile by foot or car when one considers the closest bridge). Defendant's Revised Trial Brief, Document 90, page 12. The City also granted variances to other adult businesses (all with slightly different needs and circumstances), so there is no evidence that the City was using the variance mechanism to discriminate against all adult businesses. The factual differences between the variances requested by Plaintiffs and those granted in other cases are spelled out clearly by the City, and those differences establish a factual and

legal distinction so as to defeat Plaintiffs' equal protection claim.

IV. CONCLUSION

For the reasons set forth above, the Court finds in favor of the City of Charlotte on all remaining issues.

IT IS SO ORDERED.

Signed: May 12, 2008

Graham C. Mullen
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
3:02CV00014-MU

CENTRAL AVENUE VIDEO, INC.,*et al.*,

Plaintiffs,

v.

ORDER

THE CITY OF CHARLOTTE, NORTH CAROLINA, a North Carolina Municipal corporation,

Defendant.

THIS MATTER is before this court upon Defendants' Motion for Summary Judgment (Document #46). Plaintiffs Polo South, Inc., Independence News, Inc. and O'Shields, Inc. filed a brief in opposition to this motion, and Plaintiffs Central Avenue and Video, Inc. and Riverside, Inc. filed a separate brief in opposition. Defendants filed a timely reply, therefore, this matter is now ripe for review.

I. FACTUAL BACKGROUND

This case deals with two separate ordinances, the Adult Zoning Ordinance ("AZO") and the Sexually Oriented Business Ordinance ("SOB").

Adult Zoning Ordinance

The City of Charlotte's City Council adopted the AZO on January 18, 1994. The AZO limits adult businesses to B-2 (business), UMUD (Uptown Mixed Use District), and I-1 and I-2 (industrial) zoning districts. Within these districts, adult bookstores and mini motion picture theaters must be at least 1,500 feet from any residential zoning district, school, church, child care center, park or playground (i.e. "protected uses"), and at least 1,000 feet from another adult business. Adult live entertainment businesses must be at least 1,000 feet from a protected use and at least 500 feet from another adult business. No more than one adult business may be in the same structure, and preexisting adult businesses not in compliance with the protected use separation requirements are required to close or relocate to a conforming location within eight years. The AZO's preamble states:

> Studies have shown that lowered property values and increased crime rates tend to accompany and are brought about by the concentration of adult establishments as defined herein. Regulation of these uses is necessary to insure that these effects do not contribute to the blighting of surrounding

> neighborhoods and to protect the integrity of the City's schools, churches, child care centers, parks and playgrounds which are typically areas in which juveniles congregate. It is the intent of this provision to establish reasonable regulations to prevent a concentration of adult establishments within the City of Charlotte and to separate adult establishments from . . . sensitive uses. . . .

The City of Charlotte ("the City") amended the AZO on several occasions after its adoption. These amendments refined definitions, eliminated redundant provisions, closed a conditional district "loophole," and removed a ban on the Zoning Board of Adjustments' ("ZBA") ability to grant variances to the ordinance.[1]

Sexually Oriented Business Ordinance

The City of Charlotte's City Council adopted the second ordinance at issue in this case on August 23, 1999. The City states that it enacted the SOB after

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[1] Charlotte City Ordinance No. 489 amended the AZO by removing language that barred the ZBA from granting variances to the AZO and by providing guidelines for granting such variances stating: ". . . [B]efore granting a variance from the separation requirements . . . the Board of Adjustment shall find that thoroughfares, traffic circulation patterns, structures or other natural or man-made geographic or topographic features are likely to provide an adequate measure of protection for the protected zoning or use from any secondary effects of the adult establishment."

a citizen complained that adult establishments were employing underage erotic dancers. The SOB: (1) requires that all sexually oriented businesses obtain a license; (2) makes employment of a minor unlawful; (3) regulates adult live entertainment businesses by prohibiting "VIP rooms;" (4) establishes "open booth" provisions for adult mini motion picture theaters; and (5) provides operational requirements for "clothing modeling studios." The SOB's purpose is "to regulate sexually oriented businesses to promote the health, safety, and general welfare of the citizens of Charlotte, and to establish reasonable and uniform regulations to prevent the deleterious effects of sexually oriented businesses . . ."

The Plaintiffs

Plaintiffs own and operate sexually oriented businesses that are subject to the City's AZO and SOB. Plaintiffs Central Avenue and Video, Inc. ("Central Avenue") and Independence News, Inc. ("Independence News") operate adult bookstores that do not meet requirements of the AZO and were required by the AZO's "amorization" provision to close or relocate to a conforming location by January 18, 2002. Similarly, Plaintiffs O'Shields Entertainment, Inc. ("O'Shields") and Polo South, Inc. ("Polo South") operate live adult entertainment establishments that fall under the amoritization provision as of the same date. Finally, Plaintiff Riverside Video Plus, Inc. ("Riverside") operates a non-conforming adult bookstore that was adopted into Charlotte's planning jurisdiction on October 22,

2001 and is subject to the amoritization provision on October 22, 2009. Defendant represents to the Court that all the Plaintiffs are licensed under the SOB and are presumably in compliance with the ordinance.

II. PROCEDURAL HISTORY

Approximately one year before the AZO amoritization deadline, the owners of three affected businesses filed a federal lawsuit challenging the AZO and SOB Ordinance. *See Queen City Video & News, Inc. v. City of Charlotte*, 3:00CV618 (W.D.N.C.). In addition, Central Avenue and Video and Independence News initiated this action one week before the amoritization deadline. Shortly thereafter, this Court entered a preliminary injunction in the *Queen City* case enjoining the City from enforcing the amoritization provision against any affected business pending final resolution. The Court then held this action in abeyance pending the disposition of the *Queen City* case.

On August 2, 2002, this Court granted summary judgment for the City in the Queen City case on all claims except whether the AZO "provided no or an insufficient number of places to which the First Amendment-protected adult businesses now in operation can legally relocate." Thereafter, the parties in Queen City entered into a Stipulation of Voluntary Dismissal with Prejudice, and this Court activated the pending action. The City then consented to the intervention of Plaintiffs Riverside Video, O'Shields Entertainment, and Polo South in this case and agreed that it would not enforce the

amoritization provision against Plaintiffs until disposition of this action.

Since this action was first filed by Central Avenue and Video and Independence News, the parties filed two amended complaints. The first amended complaint filed by Central Avenue, Independence News, O'Shields and Polo South asserted only one claim for relief that demands injunctive relief for violation of first amendment rights. Plaintiffs Central Avenue and Riverside filed a second amended complaint, however, in which the parties assert claims including: 1) free speech violations; 2) due process violations; and 3) equal protection violations.

On June 3, 2004, this Court granted the City's Motion for Partial Judgment on the Pleadings and dismissed the "as-applied" challenge to the secondary effects rationale of the AZO that was included in the parties' claim for first amendment violations. In addition, the Court granted Plaintiffs' motion to dismiss their claim that the SOB imposed an arbitrary or impermissible licensing fee.

III. DISCUSSION

After reviewing the parties' arguments and relevant case law, the Court finds that Plaintiffs' Motion for Summary Judgment is hereby **GRANTED, in part and DENIED, in part.**

A. STANDARD OF REVIEW

Summary judgment is proper "if the pleadings depositions, answers to interrogatories, and admissions on file, together with the affidavits, if

any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Once the movant has met the initial burden, the non-moving party must come forward with specific facts demonstrating a genuine issue for trial. *Celotex*, 477 U.S. at 323. A genuine issue for trial exists "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Pursuant to Rule 56(e), after "a motion for summary judgment is made . . . an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading," rather "the adverse party's response . . . must set forth specific facts showing that there is a genuine issue for trial." Fed. R. C. P. 56(e); *Anderson*, 477 U.S. at 250. This standard is particularly important where the nonmoving party bears the burden of proof. *Hughes v. Bedsole*, 48 F.3d. 1376, 1381 (4 Cir. 1995). There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. *Anderson*, 477 U.S. at 249. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted. *Id.* at 249-50. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the Plaintiff. *Id.* at 252. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict.

When considering summary judgment motions, courts must view the facts in the light most favorable to the party opposing the motion. *Austin v. Clark Equip. Co.*, 48 F.3d 833, 835 (4 Cir. 1995). "[T]he court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000). Indeed, summary judgment is only proper "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there [being] no genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (internal quotations omitted). However, in reviewing the whole record, the Court must remember to "disregard all evidence favorable to the moving party that the jury is not required to believe" and therefore, only "give credence to the evidence favoring the nonmovant as well as that evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that [the] evidence comes from disinterested witnesses." *Reeves*, 530 U.S. at 151.

B. Plaintiffs Independence News, Polo South and O'Shields assert Free Speech Violations

In their amended complaint, Plaintiffs Independence News, Polo South and O'Shields assert one claim supported by three arguments - that the AZO violates the free speech clause of the First Amendment and is unconstitutional. The argument of unconstitutionality is based on three premises: 1) the ordinances do not provide adequate alternative

sites for adult businesses to relocate; 2) the AZO was not drafted to eliminate legitimate secondary effects and 3) the AZO's variance provision does not allow the City's Zoning Board of Adjustment to consider factual evidence negating the secondary effects of a particular adult business, therefore the ordinance was not genuinely created to target secondary effects. This Court denies the City's summary judgment motion on this claim based on only one of Plaintiffs' three arguments - that the AZO does not provide adequate alternative avenues of communication. Plaintiffs' additional arguments regarding secondary effects have no merit.

In *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986), the United States Supreme Court established a test for determining whether zoning ordinances are constitutional. When an ordinance "does not ban adult [businesses] altogether," but merely places restrictions on the businesses' proximity to other sensitive locations (i.e. schools, churches, residential areas), the ordinance is "properly analyzed as a form of time, place, and manner regulation[s]."
Id. at 46.

Next, the Court stated:

> Describing the ordinance as a time, place, and manner regulation is, of course, only the first step in our inquiry. This Court has long held that regulations enacted for the purpose of restraining speech on the basis of content presumptively violate the First Amendment. . . . On the other hand, so- called "content neutral" time, place, and manner regulations

> are acceptable as long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication.

Id. at 46-7.

Moreover, the Court discussed and largely endorsed its holding in *Renton* in *City of Los Angeles v. Alameda:*

> If the regulation were content based, it could be presumptively invalid and subject to strict scrutiny. We held, however, that the . . . ordinance was aimed not at the content of the films shown at adult theaters, but rather at the secondary effects of such theaters on the surrounding community, namely at crime rates, property values, and the quality of the city's neighborhoods. Therefore, the ordinance was deemed content neutral. Finally, given this finding we stated that the ordinance was designed to serve a substantial government interest and that reasonable alternative avenues of communication remained available . . . and we upheld [the] ordinance.

535 U.S. 425, 434 (2002).

Here, the AZO does not ban adult businesses altogether and is properly analyzed as time, place and manner regulation. Also, the Preamble to the AZO shows that the ordinance is aimed at secondary effects such as the increased crime and lower property rates that accompany adult businesses. Therefore, this Court finds that the AZO targets legitimate secondary effects and is content neutral.

Plaintiffs Independence News, Polo South and O'Shields argue that the Charlotte City Council adopted the AZO based upon political and moral considerations instead of a legitimate concern regarding secondary effects. Specifically, these Plaintiffs assert the following: 1) the City's staff and Council members made statements that prove content suppression as the AZO's aim; 2) the AZO did not addresses one of its stated goals (keeping bars from converting to adult businesses) because the AZO does not apply to conditional districts; and 3) amortizing adult businesses that are too close to protected uses but not those that are too close to another adult business is improper. This Court holds that none of these assertions are relevant to the secondary effects analysis required in *Renton*. In *Renton*, the Supreme Court held:

> 'It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive . . . . What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it . . . .' [A] 'predominate intent' . . . is more than adequate to establish that the city's pursuit of its zoning interests was unrelated to the suppression of free expression.

Renton, 475 U.S. at 48 (quoting *United States v. O'Brien*, 391 U.S. 367, 383-84.).

Here, the AZO's predominate intent, as described in its preamble, is to curb increased crime and devalued property in areas surrounding adult

businesses. Random statements made by City Council members, details about conditional districts, and decisions to amortize fewer adult businesses do not change the City's predominate intent to address secondary effects, nor do they persuade the Court that the City had a "secret" intent to stifle protected speech.

Plaintiffs Independence News, Polo South and O'Shields' second allegation is that the AZO is unconstitutional because its variance provision does not allow the City's Zoning Board of Adjustment to consider factual evidence that an individual adult business will not have adverse secondary effects. The Supreme Court in Renton assessed the ordinance at issue as a whole, and this Court will do the same. Even considering Plaintiffs' allegation, the Court finds that overall the AZO is aimed at curing secondary effects of adult businesses.

Continuing the *Renton* analysis, the Court holds that the AZO intends to serve a substantial government interest but that genuine issues of material fact exist as to the question of alternative avenues of communication. The AZO serves the substantial governments interests of protecting areas in the City where children congregate such as churches, schools, child care centers and recreational areas from increased crime and decreased property values. The Court finds, however, the evaluation of site availability is a matter of fact that depends heavily on the analysis of witnesses knowledgeable about zoning and land use in the Charlotte area. The City asserts 9.08% of commercial acreage in Charlotte is available for adult bookstores and 15.78% is available for adult live businesses. In addition, the City cites methodology and experts that

should be evaluated by a jury, not the Court at the summary judgment stage.

Further, the City urges that the Court consider the Internet as a way that the AZO allows for alternative avenues for communication. Although the Internet has changed the legal and cultural landscape in obvious ways, the City has not presented an argument that the Internet supplants the need for physical avenues for communication. There are genuine questions of fact as to whether the resources available on the Internet are identical to those provided by the Plaintiffs. In addition, questions of fact arise as to whether access to the Internet is as universal as access to physical structures. [2] For these reasons, this Court declines to accept this rationale.

The Court denies the City's motion for summary judgment on Plaintiffs free speech violation claim but only as to the question of alternative avenues of communication left by the AZO.

C. Plaintiffs Central Avenue and Riverside assert Free Speech Violations

Plaintiffs Central Avenue and Riverside also argue that the AZO is content-based and fails to withstand strict scrutiny when assessed under the Supreme Court's Renton analysis. Alternatively, they argue that even if the Court considers the ordinance content-neutral and applies intermediate

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[2] We do not mean for this list of questions to be exhaustive, merely to illustrate why the Court does not find this reasoning to be compelling.

scrutiny, the AZO does not serve a substantial governmental interest and does not provide adequate alternative avenues of communication. Again, the Court finds that the AZO passes each step of the Renton analysis for summary judgment purposes, except the last requirement for reasonable alternative avenues of communication. The reasonableness and number of alternative avenues of communication is a factual dispute, and this Court denies summary judgment on Plaintiffs Central Avenue and Riverside's free speech claim as to that question only.

D. Plaintiffs Central Avenue and Riverside assert that the Sexually Oriented Business Ordinance and the Adult Zoning Ordinance impose an impermissible prior restraint

Plaintiffs Central Avenue and Riverside also assert that both the AZO and SOB impose impermissible prior restraints and violate the First Amendment. Prior restraints are not unconstitutional per se, however, any system of prior restraint bears a heavy presumption of invalidity. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225 (1990). A system of prior restraint must meet the following requirements to be constitutionally valid: 1) no government official or agency may have unbridled discretion; 2) the system must require that its decision maker issue or deny the license in a reasonable amount of time; and 3) the system must provide for prompt judicial review. *See id.* at 225-27.

Sexually Oriented Business Ordinance

The Court finds that the SOB does not create an unconstitutional prior restraint as a matter of law, therefore, it grants Defendants summary judgment motion as to this claim.

First, Plaintiffs argue that 1) the SOB provides unbridled administrative discretion and 2) that the ordinance does not provide a constitutionally adequate process for judicial review. This Court previously examined these issues in the earlier *Queen City* case and held that "there was no risk that expression, under this [SOB] Ordinance, could be suppressed due to unbridled administrative discretion" and that "the review process is constitutional."

Second, the Court finds that the SOB requires a decision under the ordinance in a reasonable amount of time. Under the ordinance, the chief of police must approve or deny a completed application within thirty days, and if the chief fails to act within this time, the applicant may begin operating until a decision is made. The Fourth Circuit found that a 90-day approval period for an adult business conditional use permit was constitutionally permissible. *Steakhouse, Inc. v. City of Raleigh*, 166 F.3d 634 (4th Cir. 1999). Therefore, based on Fourth Circuit precedent and the specific protections provided for applicants in the SOB ordinance, this Court finds that the SOB requires that a decision in a reasonable amount of time.

Adult Zoning Ordinance

Similarly, Plaintiffs argue that the AZO is an unconstitutional prior restraint based on its variance provision, a provision that allows the Zoning Board of Adjustment to grant variances from the AZO and provides guidelines for granting such variances. The AZO's variance provision provides:

> [B]efore granting a variance from the separation requirements . . . the Board of Adjustment shall find that thoroughfares, traffic circulation patterns, structures or other natural or man-made geographic or topographic features are likely to provide an adequate measure of protection for the protected zoning or use from any secondary effects of the adult establishment.

In *Mom N Pops, Inc. v. The City of Charlotte*, this Court held that the main body of the AZO in general was not a prior restraint because:

> [The AZO] does not involve appraisal of facts, exercise of judgment, and formation of opinion by administrators whose discretion is not bridled by objective criteria. The Charlotte zoning administrator merely determines what kind of business, by reference to statutory definitions. This is not the sort of 'discretion' that renders a zoning ordinance a prior restraint.

979 F.Supp. 372, 389 (W.D.N.C. 1997).

Defendants admit, however, that the Court in its decision only considered the "by right" zoning treatment of adult uses and not the variance mechanism. Defendants contend that it is unaware of any case law holding a zoning ordinance unconstitutional because of its variance. This contention, however, is not enough to persuade this Court that a genuine issue of material fact does not exist as to certain aspects of Plaintiffs' prior restraint claim. Whether the AZO's variance provision requires ZBA to issue a prompt decision and the extent of the Board's discretion is not known by the Court and not fully discussed by Defendants. Therefore, the Court cannot make those determinations and declines to grant summary judgment as to these aspects of Plaintiffs' claim. The Court, however, finds that adult businesses under the AZO are provided the same judicial review process that this Court found constitutional in both the *Queen City* case and this case with respect to the SOB. Therefore, any arguments by Plaintiffs that the AZO and its variance provision are a prior restraint based on a lack of judicial review is dismissed the Court.

E. Plaintiffs Central Avenue and Riverside assert that the Adult Zoning Ordinance violates the due process clause of the Fourteenth Amendment

Plaintiffs Central Avenue and Riverside allege that the AZO violates their procedural due process rights. The Due Process clause prohibits states from depriving individuals of "life, liberty or property

without due process of law," U.S. Const. Amend. XIV, § 1, and the United States Supreme Court has interpreted this clause as having procedural and substantive components. See *Daniels v. Williams*, 474 U.S. 327, 331 (1986).

Defendant does not persuasively argue in its Reply that the elements for a procedural due process claim cannot be satisfied and no genuine issue of material fact exists. Therefore, the Court declines to grant summary judgment as to Plaintiffs Central Avenue and Riverside's procedural due process claim.

F. Plaintiffs Central Avenue and Riverside assert that the Sexually Oriented Business ordinance and Adult Zoning Ordinance violate their substantive due process rights and the Equal Protection clause of the Constitution

Plaintiffs argue their substantive due process and Equal Protection claims together. Plaintiffs Central Avenue and Riverside allege that the AZO and its variance procedure violate their substantive due process rights and the Equal Protection clause of the Fourteenth Amendment. Plaintiffs argue that because they were denied variances by the ZBA that they were treated differently than similarly situated entities, namely the adult businesses that were granted variances.

Plaintiffs provide very little legal support for their arguments, but the City fails to convince the Court that no genuine issues of material fact exist. The City relies on a North Carolina Court of Appeals case that instructs courts to look at factual

situations for different variance decisions, and it points to radial maps and decision letters for variances cases decided by the ZBA. These assertions, however, only highlight factual issues that this Court may not determine on summary judgment. Therefore, this Court denies the City's motion for summary judgment as to Plaintiffs Central Avenue and Riverside's substantive due process and equal protection claims.

G. Plaintiffs Central Avenue and Riverside's free speech claim alleges that the Sexually Oriented Business ordinance and Adult Zoning Ordinance are unconstitutional because they do not serve substantial and compelling governmental interests and are not narrowly tailored

Plaintiffs Central Avenue and Riverside's Amended Complaint contains two allegations within its third count for "free speech violations" that claim the SOB and AZO discriminate against viewpoint without being narrowly tailored or serving a substantial and compelling governmental interest. Defendant moves to dismiss these allegations on summary judgment, and this Court will grant the City's request.

"A regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so." *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989). Moreover, the Court in *Ward* noted that the narrowly tailored requirement is satisfied "[s]o long as the means

chosen are not substantially broader than necessary to achieve the government's interest." *Id.* at 800. "[T]he regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative, according to the Court. Id.

Sexually Oriented Business Ordinance

Here, the SOB establishes operational restrictions for adult live entertainment businesses, mini motion picture theaters, and clothing modeling studios. In addition, the SOB contains prohibitions on employing minors and requires all adult businesses to obtain a license. The substantial government interests served by the SOB are listed in the ordinance and include promoting the health, safety, and general welfare of Charlotte citizens and protecting these citizens from increased crime, decreased property values, the spread of communicable diseases. The Court finds that requiring adult businesses to obtain a license is a narrowly tailored measure to advance these interests. Moreover, these regulations are narrowly tailored to serve the substantial governmental interest of protecting minors from harmful adult activity. Therefore, the Court finds that no genuine issue of material facts exists as to Plaintiffs allegation that the SOB causes unconstitutional viewpoint discrimination and such an allegation is dismissed on summary judgment.

Adult Zoning Ordinance

Again, the Court finds that the AZO is designed to further the substantial content-neutral interests of curbing crime and decreased property values that are caused by adult businesses and protecting sensitive uses from being harmed by adult activity. Plaintiffs' allegation suggest that adult bookstores are more severely regulated than other adult businesses. Plaintiffs, however, give no support for this assertion. In addition, the Court holds that the AZO is a narrowly tailored regulation. The AZO requires adult businesses to operate away from protected areas but the regulation only requires that those businesses operate outside a restricted area, namely 1,000 feet from the protected use. Therefore, this Court holds that no material issue of genuine fact exists as to Plaintiffs' allegation of viewpoint discrimination by the AZO and such allegation is dismissed on summary judgment.

IT IS, THEREFORE, ORDERED that Defendant's Motion for Summary Judgment (Document #46) is hereby **GRANTED, in part and DENIED, in part.**

Accordingly, summary judgment is GRANTED as to the following:

1) all elements under the *Renton* analysis in Plaintiffs Polo South, Independence News, and O'Shields' free speech claim, except the element of alternative avenues of communication;
2) all elements under the *Renton* analysis in Plaintiffs Central Avenue and Riverside's free

speech claim, except the element of alternative avenues of communication;
3) Plaintiffs Central Avenue and Riverside's prior restraint claim regarding the Sexually Oriented Business ordinance;
4) the element of adequate judicial review in Plaintiffs Central Avenue and Riverside's prior restraint claim regarding the Adult Zoning Ordinance;
5) Plaintiffs Central Avenue and Riverside's allegation of viewpoint discrimination regarding the AZO; and
6) Plaintiffs Central Avenue and Riverside's allegation of viewpoint discrimination regarding the SOB.

Accordingly, summary judgment is **DENIED** as to the following:

1) the element of alternative avenues of communication in Plaintiffs Polo South, Independence News, and O'Shields' free speech claim;
2) the question of alternative avenues of communication in Plaintiffs Central Avenue and Riverside's free speech claim;
3) Plaintiffs Central Avenue and Riverside's prior restraint claim regarding the Adult Zoning Ordinance, except as to the element of adequate judicial review;
4) Plaintiffs Central Avenue and Riverside's procedural due process claim; and
5) Plaintiffs Central Avenue and Riverside's substantive due process and equal protection claims.

Signed: September 6, 2006

Graham C. Mullen
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF NORTH CAROLINA

CHARLOTTE DIVISION

3:02cv14

CENTRAL AVENUE
VIDEO, INC..,*et al.*,
Plaintiff,

V. **ORDER**

THE CITY OF
CHARLOTTE,
NORTH CAROLINA,
a North Carolina, municipal
Corporation,

Defendants

THIS MATTER is before the Court upon Defendant's 8 April 2004 "Motion for Partial Judgment on the Pleadings" (Document #40) and "Memorandum in Support ..." (Document #41). On 27 April 2004, Plaintiffs' filed a Response in the form of a "Brief in Opposition to Defendant's Motion ..." (Document #42). On 4 May 2004, Defendant filed a Reply to arguments in Plaintiffs Response (Document #43). Accordingly, Defendant's Motion is

ripe, and the Court is prepared to rule in this MATTER.

I. STANDARD OF REVIEW

Pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, "[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." In deciding a Rule 12(c) motion for judgment on the pleadings, the court must apply the standard for a Rule 12(b)(6) motion. *See Edwards v. City of Goldsboro,* 178 F.3d 231,243 (4th Cir. 1999). "A motion to dismiss under [Fed. R. Civ. P. 12(b)(6)] tests the sufficiency of a complaint; importantly, it does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." *Republican Party of North Carolina v. Martin,* 980 F.2d 943,952 (4th Cir. 1993) *citing* 5A C. WRIGHT & A. MILLER, FED. PRACTICE AND PROCEDURE § 1356 (1990).

"A motion to dismiss for failure to state a claim should not be granted unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of[the subject] claim." *MeNair v. Lend Lease Trucks, Inc.,* 95 F 3d 325, 328 (4th Cir. 1996) *(en bane)* (citations omitted). In considering a Rule 12(b)(6) motion, the complaint must be construed in the light most favorable to the nonmoving party, assuming factual allegations to be true. *See, e.g., Hishon v. King & Spalding,* 467 U.S. 69, 73 (1984); *Revene v. Charles County Comm'rs,* 882 F.2d 870,

872 (4th Cir. 1989). "A complaint should not be dismissed for failure to state a claim ... unless after accepting all well-pleaded allegations in the plaintiff's complaint as true and drawing all reasonable factual inferences from those facts in the plaintiffs favor, it appears certain that the plaintiff cannot prove any set of facts in support of his claim entitling him to relief." *Veney* v. *Wvche,* 293 F.3d 726, 730 (4thCir. 2002).

II. DISCUSSION

According to Defendant City of Charlotte's ("Charlotte") pleading in this matter, Plaintiffs Independence News, O'Shield's Entertainment and Polo South cannot state an "as applied" claim challenging the "secondary effects" rationale of Charlotte's decision to adopt the Adult Zoning Ordinance ("AZO"). In support of this proposition, Charlotte relies on the Supreme Court's decision in *Ward* v. *Rock Against Racism,* 491 U.S. 781 (1989). In *Ward,* New York City passed on ordinance regulating the volume of publicly performed music by requiring performers to use sound-amplification equipment and a sound technician provided by the city. A rock concert sponsor raised a First Amendment "as applied" challenge to the regulations secondary effects rationale. After concluding that the city's regulation fell squarely within the time, place and manner jurisprudence, the Supreme Court noted that "the validity of the [time, place, and manner] regulation depends on the relation it bears to the overall problem the government seeks to correct, not

on the extent to which it furthers the government's interests in an individual case." *Ward,* 481 U.S. at 800-01. Thus, in Defendant's view, *Ward* stands for the proposition that a Plaintiff can not state an "as-applied" challenge to a regulation seeking to mitigate the secondary effects of constitutionally protected activity, where that regulation merely burdens the time, place and manner of the constitutionally protected conduct.

In Response, Plaintiffs contend that the Supreme Court's more recent case in *Los Angeles v. Alameda Books, Inc.,* 535 U.S. 425 (2002), establishes a burden shifting requirement that is inconsistent with the purported "as-applied" holding in *Ward,* and particularly the application of that holding to this matter. In *Alameda,* the Supreme Court considered whether a Los Angeles municipal code section prohibiting "the establishment or maintenance of more than one adult entertainment business in the same building" violated the First Amendment. Specifically, in holing that the reduction of crime was a substantial government interest for the purpose of justifying a time, place and manner regulation, the Supreme Court looked at the data supporting the connection between the challenged regulation and crime reduction and noted, generally, that:

> [A] municipality can not get away with shoddy data or reasoning. The municipality's evidence must fairly support the

> municipality's rationale for its ordinance. If plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the standard . . . . If plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance.

Alameda Books, Inc., 535 U.S. 425, 438-439 (2002).

However, as Charlotte accurately notes in its Reply, the issue in *Alameda* was the government's justification for adopting the statute, not, as in *Ward* or as in this matter, the justification for applying the ordinance to a particular business. Accordingly, under *Alameda*, if Plaintiffs "cast doubt" on the factual basis for the secondary effects that supported the adoption of the AZO, that doubt has a significant burden shifting consequence. However, under *Ward*,

Plaintiffs can not shift the burden to Charlotte to produce evidence supporting the secondary effects rationale for adopting the AZO, in general or as applied, simply by "casting doubt" on the application of the AZO to a particular business or locale. Although, at this point in the litigation, it is not settled whether or not Charlotte had a sufficient factual basis to support the adoption of the AZO, it is nonetheless settled that Plaintiffs can not maintain an "as-applied challenge" to secondary effects rationale of the AZO's time, place and manner restrictions. *See Ward,* 481 U.S. at 800-01; *see e.g., Thorburn v. Austin, 231* F.3d 1114, 1120 (8th Cir. 2000); *International Caucus of Labor Committees v. City o/Montgomery,* 111 F.3d 1548, 1552 (11thCir. 1997).

IT IS THEREFORE ORDERED that Defendant's 8 April 2004 "Motion for Partial Judgment on the Pleadings" (Document #40) is GRANTED. Accordingly, Plaintiffs in this matter are precluded from maintaining an "as-applied" challenge to the secondary effects rationale of Charlotte's Adult Zoning Ordinance.

This 3rd day of June, 2004.

GRAHAM C. MULLEN
CHIEF UNITED STATES DISTRICT JUDGE